

Tam M. Doduc, Chair
Gerald D. Secundy, Board Member
Arthur G. Baggett, Jr., Board Member
Charles R. Hoppin, Board Member
Dr. Gary Wolff, Board Member
Celeste Cantu, Executive Director
Elizabeth Jennings, Staff Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
Facsimile (916) 341-5199

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**Re: Boeing Petitions, WDR R4-2004-0111, R4-2006-008
Comments of Waterkeepers, Heal the Bay, and NRDC**

Dear Madam Chair and Members of the Board:

Thank you for the opportunity to comment on the Petitions of Boeing regarding its permits for the Santa Susana Field Laboratory (“Boeing Permit(s)”). These comments are made on behalf of the California Coastkeeper Alliance (an alliance of the California Waterkeepers, including San Diego Baykeeper, Santa Monica Baykeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, the San Luis Obispo Coastkeeper, Baykeeper, Deltakeeper, the Russian Riverkeeper, and the Humboldt Baykeeper (“Waterkeepers”), Heal the Bay, and Natural Resources Defense Council (collectively “Environmental Commenters”).

In this letter, the Environmental Commenters will highlight their continuing concerns regarding the State Water Resources Control Board’s (“State Board”) failure to require implementation of numeric effluent limits, illustrate that in this case these limitations are clearly not “more stringent” than the Clean Water Act requires, and also show that, in all cases, the Regional Water Quality Control Board, Los Angeles Region (“Regional Board”) has the discretion to require the challenged limitations. The State Board should affirm the Regional Board and it should directly reject the assertion that the limitations somehow exceed the requirements of the Federal Clean Water Act (“CWA”).

San Francisco

1004 A O'Reilly Ave, San Francisco CA 94129
t 415-440-6520 f 415-440-4155

Santa Monica

2515 Wilshire Blvd, Santa Monica CA 90403
t 310-829-1229 f 310-829-6820

I. Stormwater Permits Must Include Numeric Effluent Limits to Ensure Compliance with Water Quality Standards.

It is an axiom of the Clean Water Act that all NPDES permits must require compliance with effluent limitations established under 33 U.S.C. Section 1311. 33 U.S.C. Sections 1342 (a)(1), (3). Effluent limitations are defined in the Act as restrictions on “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . .”. 33 U.S.C. Section 1362(11). The CWA requires all NPDES permits to include effluent limitations necessary to meet Water Quality Standards (“WQS”). 33 U.S.C. Section 1311(b)(1)(c).

In the *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (1999), the U.S. Court of Appeals for the 9th Circuit held that Congress has expressly required industrial stormwater dischargers to comply with the requirements of 33 U.S.C. Section 1311 and, therefore, such dischargers must meet effluent limitations, including any more stringent limitations necessary to meet water quality standards established pursuant to any State law or regulation. The United States EPA has adopted the California Toxics Rule (“CTR”) and the National Toxics Rule (“NTR”), both containing numeric water quality criteria for toxic pollutants in California. In addition, Water Quality Standards are contained within Basin Plans and the Ocean Plan developed by the Regional and State Boards and approved by the US EPA.

Accordingly, industrial stormwater dischargers such as Boeing must comply strictly with these WQS. Furthermore, the Boeing Permit must include requirements to achieve compliance with these standards. Not only must the industrial discharges emanating from the Boeing facility comply strictly with WQS, the State and Regional Boards as the State NPDES permitting authority are in fact required to issue a permit with requirements that ensure industrial discharges comply strictly with WQSs. In other words, the Board may not simply tell a discharger *not* to violate WQS, but it must tell such dischargers *what to do* in order to comply with WQS by providing permitting requirements that will ensure industrial discharges comply strictly with WQS. As the Court held in *Defenders of Wildlife*, *NPDES permits for industrial facilities are mandated to include requirements that receiving waters meet water quality based standards* (emphasis added).

Boeing argues that because EPA and the State Board have issued General Permits for stormwater discharges from industrial and construction activities that do not include numeric effluent limits, numeric limits are inappropriate for any stormwater permits.

Unfortunately, the State Board’s reliance on narrative technology-based effluent limitations in the statewide General Industrial and Construction Permits has resulted in the continued discharge of industrial and other pollutants to California waters, causing

and contributing to further water quality impairments. The situation now at hand, i.e., 687 Section 303(d) listed impaired waters and a host of industrial discharges who continue to violate WQS, hardly conforms to Congress' original intent in enacting the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters . . ." 33 U.S.C. section 1251(a), or "the national goal that the discharge of pollutants to navigable waters be eliminated by 1985". 33 U.S.C. section 1251(a)(1). Therefore, the State Board must adopt more stringent effluent limitations to ensure that all industrial dischargers comply strictly with WQS. Numeric effluent limitations are the only way California can ensure that all permitted industrial stormwater discharges within the State meet WQS.

Sampling data collected under the General Industrial Permit demonstrates the failure of the BMP based scheme. The Waterkeepers have analyzed sampling data for dischargers operating under the General Permit (BMP/technology based effluent limitations) and dischargers operating under individual stormwater permits (numeric effluent limitations). The comparison is striking. For all industries reporting metals concentrations, only 43% of the dischargers operating under the General Permit comply with the Cu Multi-Sector Permit Benchmark, while 71% comply with Pb benchmark levels. For the Los Angeles Region, well over 90% of dischargers are causing or contributing to excursions of WQS. In contrast, two Los Angeles facilities with numeric effluent limits for stormwater comply with those limits between 90 and 99% of discharges sampled.

When the Regional Board determines that a given discharge causes, or has the reasonable potential to cause or contribute to excursions above WQS, it must impose effluent limitations that will ensure compliance with those WQS. 40 C.F.R. § 122.44(d)(1). Industrial discharges of all other pollutants to waters which are impaired by those same pollutants must be required by the permit to meet end of pipe narrative and numeric water quality standards contained in applicable Basin Plans. In determining that numeric limits are necessary for the Boeing facility, the Regional Board reviewed a robust data set of stormwater sampling from the site. The data demonstrated that discharges from Boeing has in fact consistently exceeded WQS, and that the BMP based limits in previous versions of the Boeing Permit had failed to prevent those excursions. Therefore the Regional Board was required to adopt and include within the Boeing Permits numeric effluent limitations for all pollutants that caused or contributed to WQS exceedances.

The Regional Board correctly completed the analysis required by the Clean Water Act, and correctly imposed effluent limits that will ensure strict compliance with WQS. As such, the permit for Boeing's facility is both legal and appropriate.

II. Eliminating Numeric Effluent Limitations from NPDES Permits Is the Exception and Not the Rule.

Putting aside for now the question as to whether numeric limitations are in fact required for industrial stormwater permits in all instances, it is abundantly clear that numeric limitations are embedded in the basic structure and provisions of the Clean Water Act. As discussed below, in resolving the Boeing matter, the State Board should recognize this reality, even if it believes that numeric effluent limitations are infeasible in this or another situation.

A. The Regional Board Properly and Reasonably Imposed Numeric Limits for Stormwater and Process Water Discharges.

The Regional Board clearly followed a rational process in adopting the numeric limits in the Boeing Permit. The Regional Board evaluated a robust wastewater data set for the site, conducted a Reasonable Potential Analysis consistent with State and Federal Regulations and Guidance Documents. Having concluded that the discharges were contributing to exceedances of Water Quality Standards, and that the BMP based effluent limits in Boeing's previous permits had failed to ensure compliance, the Regional Board developed numeric Water Quality Based Effluent Limitations based on the EPA Technical Support Document for Water Quality Based Toxics Control and the California Inland Surface Waters, Bays and Estuaries Plan. Nothing in this manner of decision-making exceeded the baseline requirements of the Clean Water Act, and every step in this process is consistent with the process applied in permits across the State.

Leaving aside again questions relating to whether an RPA is *required* for all permits regulating stormwater,¹ or whether the ISWP process *must* be applied to stormwater permits,² the Regional Board clearly could use those tools provided to the regulatory agency under the Clean Water Act, and those methods were a logical and appropriate way to develop numeric effluent limits where the Regional Board determined those limits were necessary to protect water quality. Given that the entire NPDES scheme utilized by the State and Regional Boards is based on these tools, Boeing cannot realistically argue otherwise.

B. Because numeric effluent limitations are not “more stringent” than Federal requirements, Regional Boards May Impose Numeric Effluent Limitations to Protect Water Quality Without Considering Factors Set Forth in Porter-Cologne.

¹ The San Diego Regional Board has taken the position that RPAs are never required for permits regulating only stormwater discharges in *Divers Environmental Conservation Organization v. SWRCB*, D046112.

² The ISWP states that it does not apply to permits regulating stormwater only. *ISWP*, fnnt 1.

Boeing asserts that numeric limits for stormwater goes beyond State and Federal requirements. This is simply incorrect.

Numeric effluent limitations do not exceed and are not more stringent than the effluent limitations required under the Clean Water Act. On the contrary, the CWA expressly contemplates that numeric effluent limitations are the presumptive tool used to limit the discharge of pollutants to waters of the United States. EPA requires that numeric limitations be incorporated into individual stormwater permits whenever, as here, there is sufficient information to develop them:

“Due to . . . the typical lack of information on which to base numeric water quality-based effluent limitations . . . EPA will use an interim permitting approach [using BMPs]. *In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into stormwater permits as necessary and appropriate.* This interim permitting approach is not intended to affect those stormwater permits that already include appropriately derived numeric water quality-based effluent limitations.” *EPA, Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits*, 61 Fed. Reg. 43761, Aug. 26, 1996.

Indeed, while a WQBEL may under some exceptional circumstances be non-numeric, “in most cases, the easiest and most effective chemical-specific limitation would be numeric.” *Id.*, at 1105, quoting *In the Matter of the Petition of Citizens for a Better Environment et al.*, WQ 91-03, May 16, 1991.

EPA regulations further confirm this conclusion by emphasizing that non-numeric limitations may be derived when it is *not possible* to derive numeric effluent limits. . See, e.g., 40 C.F.R. 122.44(k). Indeed, no subsection of Section 122.44(k) provides that non-numeric limitations shall be the only limitation imposed on the flow of pollutants in stormwater permits. Therefore, even in the situation where non-numeric limitations are authorized (Section 122.44(k)(2)), there is no statutory or regulatory basis to conclude that numeric effluent limitations are as a result “more stringent” than required by the Clean Water Act or not authorized by the Act. Instead, the additional authority provided by the Act’s regulations in some situations to use BMPs resides, in those instances, alongside numeric limitations as companion elements of the Act’s basic pollution limit “toolbox.”

As noted previously, in crafting the numeric effluent limitations for the Boeing Permits, the Regional Board evaluated wastewater data for the site, conducted a Reasonable Potential Analysis consistent with State and Federal Regulations and

Guidance Documents, and rationally concluded both that the discharges were contributing to exceedances of WQS and that the BMP-based effluent limits in Boeing's previous permits had failed to ensure compliance with WQS. The Regional Board determined that numeric limitations were not only needed but were also feasible for the Boeing facility. Under these facts, the permit requirements simply meet—yet do not exceed—the baseline requirements of the Clean Water Act.³

When, as here, the Regional Board conducts a reasoned analysis and determines that numeric effluent limitations are both feasible and necessary to protect water quality, the State Board should recognize that such limitations are not “more stringent” than required by the Clean Water Act.⁴

C. Eliminating Existing Numeric Limits Violates Anti-Backsliding Requirements of the Clean Water Act

The Clean Water Act's anti-backsliding provision states that:

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

33 U.S.C. § 1342(o)(1). Boeing's permit has contained numeric effluent limitations for stormwater discharges since at least 2004. Elimination of those limits now, as Boeing urges, will violate the anti-backsliding requirement of the CWA.

³ Boeing also argues that the Regional Board bears the burden of proving that compliance with numeric limits at the Boeing site is feasible. This argument was specifically rejected by the Court in *Burbank v. State Board*, 124 Cal. App.4th 866, 888-889(2005). *BIA* established that the burden of proof regarding the feasibility of meeting the numeric effluent limitations does not lie with the Regional Board; rather, the burden lies with the discharger to prove that the numeric limitations are infeasible. *Id.*

⁴ Indeed, even assuming for the sake of argument that Boeing's characterization of the situation were accurate, the State Board has an overriding institutional interest not to divest Regional Boards of the ability to exercise lawful and reasonable discretion. *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal. App. 4th 1377 (2006) (“The permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants”), citing *Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292, 1308 (1992). Accordingly, the State Board should uphold the challenged limitations as they are neither more stringent than Federal law nor, in any case, unauthorized by the Clean Water Act.

III. Given the Failure of the BMP Based Permitting Scheme, the State and Regional Boards Must Maintain All Options to Achieve Water Quality Standards and Implement TMDLs.

As has repeatedly been pointed out by the Environmental Commenters, the BMP based General Industrial and Construction Stormwater Permits have failed to ensure compliance with Water Quality Standards. Faced with increasing 303(d) listings of impaired waters, data demonstrating the failure of MS4 and Industrial stormwater permits to ensure compliance with Water Quality Standards, and the requirement to implement TMDLs, the State and Regional Boards are investigating regulatory options beyond BMP based permits to control stormwater pollution. For example, the State Board commissioned the “Blue Ribbon Committee” with evaluating objective standards for determining compliance with stormwater permits, including numeric effluent limits. In setting numeric effluent limitations for stormwater in the Boeing Permit, the Los Angeles Regional Board has acknowledged the inadequacy of the current scheme to allocate and control metals loading in area receiving waters, and has proposed more stringent limits in the unique setting of a rocket test facility upstream of residential neighborhoods. Here, the limitations are clearly compliant with baseline components of the Clean Water Act and are otherwise supported by the discretion imbued in the Regional Boards. For these reasons, rather than limiting its options in addressing the single largest source of contaminants to California’s waters, contaminated stormwater, the provisions of the Clean Water Act and sound public policy requires that the State Board uphold the challenged limitations.

Please call the offices of Lawyers for Clean Water with questions about any of the above.

Sincerely yours,

Daniel Cooper
Lawyers for Clean Water
Attorneys for California Coastkeeper

David Beckman
Natural Resources Defense Council

Mati Waiya
Wishtoya Foundation and
Ventura Coastkeeper

Tracy Egoscue
Santa Monica Baykeeper